United States Court of Appeals

for the Second Circuit

APPENDIX

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75-1203

To be argued by
THOMAS J. CONCANNON

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

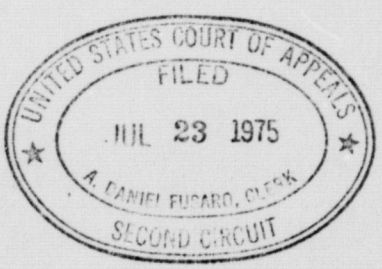
ELVA MORALES,

Appellant.

Docket No. 75-1203

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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THOMAS J. CONCANNON,
Of Counsel.

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PAGINATION AS IN ORIGINAL COPY

D. C. Form No. 100

CRIMINAL DOCKET

JUDGE FRANKEL

74 CRIM. 1139

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	*For U. S.:*
vs.	Bancroft Littlefield,Jr.
ELVA MORALES	791-0069
	For Defendant:

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED				
			DATE	NAME	RECEIVED		DISBURSED
(07)							
Fine,							
Clerk, J.S.3 ✓							
Marshal,							
Attorney,							
Commissioner's Court,							
Witnesses,							
Consp. to viol. Fed. Narco. Laws.(Ct.1)							
(One Count)							

DATE	PROCEEDINGS
12-20-74	Filed indictment. (Superseding 74 Cr 456 and referred to Frankel,J.)
12-24-74	Filed notice of readiness for trial.
12-27-74	Filed Information charging prior narcotic offense
3-25-75	Deft pleads not guilty, cont'd. on bail as set in previous indictment...TRIAL BY JURY COMMENCED..Atty.present.
3-26-75	Trial cont'd.
3-27-75	Trial cont'd & concluded..Jury returns a verdict of GUILTY ...P.S.I. ordered sentence set for 5-14-75 at 9:45 a.m. Cont'd on present bail of $15,000 p.r.b. secured by 10%. Frankel,J.....

— OVER —

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
4-9-75	Filed Govt's requested voir dire questions of prospective jurors...		
4-9-75	Filed Govt's request to charge..		
4-28-75	Filed transcript of record of proceedings, dated April 28, 1975		
5-5-75	Filed memorandum in support of motion for judgment of acquittal...		
5-12-75	Filed memorandum of the Govt.in opposition to motion for judgment of acquittal.		
5-28-75	Filed Judgment, (Atty Thomas Concannon present). The Imposition of prison sentence is suspended. Deft is placed on probation for Four (4) Years, subject to the standing probation order of the Court. Frankel, J. ENTERED 5-30-75		
5-29-75	Filed notice of appeal from final judgment of May 28-75...Copy given to U.S.Atty. and mailed to deft at 558 W. 193rd St. NYC.....Leave to appeal in forma pauperis is granted.....Frankel,J....		

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :

-v- : INDICTMENT

ELVA MORALES : S 74 Cr.

Defendant. :

74 CRIM. 1189

The Grand Jury charges:

1. From on or about the 1st day of January, 1974 and continuously thereafter up to and including 2nd day of July, 1974, in the Southern District of New York, ELVA MORALES the defendant, and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendant unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about April 12, 1974, the defendant ELVA MORALES spoke with a man by telephone.

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2. On or about April 12, 1974 defendant ELVA MORALES and a second female received a sample of cocaine from a man at the Skyline Motor Inn, 10th Avenue and 50th Street, New York, New York.

3. On or about April 12, 1974 defendant ELVA MORALES negotiated to purchase approximately three pounds of cocaine for $39,000 at the Skyline Motor Inn, 10th Avenue and 50th Street, New York, New York.

(Title 18, United States Code, Section 846.)

Louis J. Freeh
Deputy FOREMAN

Paul J. Curran
PAUL J. CURRAN
United States Attorney

74 CRIM. 1189

Form No. USA-33s-274 (Ed. 9-25-58)

United States District Court
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

ELVA MORALES

INDICTMENT

United States Attorney.

A TRUE BILL

Louis J. Ferullo
Foreman.

FPI—SS—2-19-71—20M—6950

JUDGE FRANKEL

MAR 25 1975 Dft Pld. not guilty. Cont'd on bail as set on previous indictment

DAVIS, AUSA

MAR 25 1975, Trial by jury commenced. Atty, Thomas Concannon pres.

MAR 26 1975 Trial Continued.

MAR 27 1975 Trial continued & concluded. Jury returns a verdict of Guilty. P.S.I. ordered. Sentence set for 5/14/75 at 9:45 AM. Cont'd on prev bail of $15,000 P.R.B. Secured by 10%

Frankel. J.

MAY 29 1975. Dft. & U.S. Atty. Bancroft Littlefield, Jr. & Dft's atty. Thomas Concannon present. Imposition of sentence is suspended. Dft is placed on probation for four (4) years, subject to the standing probation order of this Court

Frankel. J.

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United States of America :

v. :

Elva Morales, : 74 Cr 1139

Defendant. :

----------x

March 27, 1975
11 a.m.

(Trial resumed, jury present.)

CHARGE OF THE COURT

THE COURT: Good morning, ladies and gentlemen. We are late, which I regret. I think I am permitted to tell you that it is not the fault of anybody in this room. It is still regrettable, but I imagine it is appropriate to say that much to you.

Having said that, let me proceed to give you your instructions, so that we can put the case in your hands for your effort to do justice between these parties.

These instructions are, as we say and as the fact is, the law that governs this case. The law is not very complicated, but you must be told about it, and it is my job to convey it to you.

Your responsibility, the graver and more difficult responsibility, is to seek the truth from the evidence that has been placed before you, and to undertake to arrive at a

verdict by applying the rules I will be telling you about to the facts as you find them.

You have been reminded by counsel that it is for you to find the facts, and while that is repetitious and obvious, it is basic. So I remind you too that it is your sovereign judgment that will determine where the truth lies in this case. It is not anything the lawyers say and it is not anything that I say. It is for you to appraise the evidence and weigh and sift it and decide what really happened at the time and places about which you have heard. It is for you to draw the inferences from the evidence you have heard, and it is your prerogative to make judgments about credibility in putting these events back together.

You are to do that, as I say, from the evidence. Remember that the indictment which you have been reminded of and which I will be reading to you is not evidence. It is the set of accusations from which the issues in this case are created. They are created by the defendant's having entered a plea of not guilty. That means that before she may be convicted on the charge against her, you must be convinced of her guilt beyond a reasonable doubt. That burden of proof on the Government never shifts, and it applies, as I will be reminding you, to every essential element in the case.

Whether the burden has been sustained does not depend on quantity of the evidence or its bulk, its weight in any physical sense or how long the trial took; it depends on how that evidence, now that it is completed, affects your collective judgment and what you find to have been proved by the evidence and whether, of course, in the end you find that the things the Government must prove before you may convict have been established beyond a reasonable doubt.

That last phrase is very familiar to everyone: beyond a reasonable doubt. It is basic in criminal cases in our system, and it is necessary to say a few words about what we undertake to convey to you in that ancient and familiar and fundamental set of words.

First, like other words, the effort in that expression is to convey what the words literally say. A reasonable doubt is a doubt that arises from your reason, your reason applied to the record of evidence that has been placed before you. It is a doubt that has substance and is not merely shadowy. It is a doubt that has its inception, as I say, in your reason, your collective judgment, your common sense, your experience, all addressed to the evidence or lack of evidence as you find it in what you have seen and heard.

It is not an excuse to avoid performing an

unpleasant duty. It is not a basis for a pretext for extending sympathy to any person in any case. A reasonable doubt is the kind of doubt that would make a prudent person hesitate before taking action in some matter of importance to himself or herself. Saying that in other words, if you have in your own affairs some serious decision to make, and if you proceed objectively and coolly to review the factors, the matters that have a bearing on that decision, and if at the end of that review you find yourself beset by uncertainty and unsure of your judgment, you have a reasonable doubt.

The converse is also true. If you have such a serious decision to make and if you proceed to the kind of objective and detached review I have just described, and if at the end of that process you don't have such uncertainty or reservation, then you don't have a reasonable doubt.

Proof beyond a reasonable doubt does not mean proof beyond any conceivable doubt or proof to an absolute certainty. If it meant that, then nobody in any criminal case could ever be convicted where there are issues about matters of fact. The reason for that, without being excessively philosophical or metaphysical, is that it is in the nature of disputes about matters of fact that they cannot be proved to an absolute or mathematical certainty. That is, I think, particularly clear with respect to disputes

about things that lie in the past that are already gone.

So we don't mean that kind of absolute certainty and we don't mean proof beyond any possible doubt.

On the other hand, concluding on this subject, I trust you understand from what has been said in these fairly standard instructions that in a criminal case, in our system, the burden of proof on the Government is a very high one and that you may convict only if your minds in the end are free of the kind of reservation and uncertainty I have been talking about.

It is a corollary of this burden of proof being wholly on the Government that a defendant in a criminal case does not have to prove anything. The defendant in a criminal case need not present any evidence whatever, and may rely on his or her contention that the Government, in the examination and cross-examination of witnesses and in the other evidence, has failed to sustain its burden of proof beyond a reasonable doubt.

Putting that another way, in standard legal language, the defendant in a criminal case with us is presumed to be innocent. You have all heard of the presumption of innocence. It means that the presumption by itself is enough to require you to acquit until or unless, as I have said over and over, you are convinced of guilt

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beyond a reasonable doubt.

It should be obvious that, since a defendant is not required to prove anything or present any evidence, a defendant has an absolute right, a constitutional right, in our system, to decide whether he or she will take the witness stand. This defendant has determined with her counsel not to take the witness stand. You will understand that in protecting her rights fully you must not draw any inference of any kind against her based on the exercise of that right. I think it is enough to say on that subject that the fact that the defendant did not take the stand ought not to play any part at all in your deliberations on this case.

With those fundamental principles before you, and we count on you to keep them in mind, let us proceed toward the problems and the issues presented to you in this case.

First, by way of background, let me tell you that all crimes in the federal system -- and I guess in just about all our states -- are defined by statutes, by laws enacted by the legislatures, the Congress in the case of the federal establishment. That is mostly of historical interest to lawyers, but there used to be a time when there were so-called common-law crimes, crimes that were defined, formulated,

by judges in their decisions. But we don't have that any more.

So whenever somebody is accused of a federal crime, it means that the person is accused of having violated some enactment, some law written by the Congress.

You don't need to know those laws and none of us memorize them, but just in a general way let me tell you that the Congress has written certain statutes that make it a crime to distribute or to possess with intent to distribute certain so-called narcotic drug controlled substances. One of those substances is cocaine, and it is a crime, therefore, to distribute cocaine or to possess it with intent to distribute it.

The same set of statutes also makes it a crime to conspire to do these things, to conspire to distribute cocaine or to conspire to possess cocaine with intent to distribute.

I have used those words a lot. Let me just say they are not very complicated. Distribution in this setting means simply the transfer or sale of the substance. Possession means possession. Possess, to possess with intent to distribute, simply means to possess with the intent or purpose of transferring or selling.

Miss Morales in this case is accused by this

indictment of having been in a conspiracy to distribute cocaine or to possess it with intent to distribute it.

Let me just very briefly and again rather generally mention to you the meaning of this notion of conspiracy, and I will be repeating much of this in a couple of minutes, but let me distinguish it at this point from so-called substantive offenses, and let me do it by reference to a kind of crime that has nothing to do with this case.

You could have a conspiracy to rob a bank. In that situation the robbery of the bank would be the so-called substantive offense. The conspiracy to rob the bank is a combination or agreement or understanding among two or more people that they will undertake to rob the bank. The distinction is most easily understood if I say to you that the conspiracy is a crime separate and distinct from the substantive offense, a crime that may occur, may be established, even though the substantive offense is never carried out.

So, in the case of a conspiracy to rob a bank, people could agree to rob a bank and take certain steps toward carrying out the robbery. And if they do those things -- and I will define this more fully in terms of our case for our purposes, but very briefly described -- if they do those things, they could be guilty of conspiracy,

even though, as it turned out, they never did rob the bank. There you would say they might be guilty of conspiracy, though the substantive offense was never carried out.

We have a similar setup in the scheme of statutes involved in this case. Again, it is a crime to distribute cocaine or possess it with intent to distribute. Those are the substantive offenses forbidden by Congress. It is also a crime to conspire to do any of those things, and again the charge in this case is a charge of conspiracy to distribute or possess with intent to distribute.

Having told you all that, let me read the indictment to you and then talk to you about what the Government must have proved before you may convict. I am going to read it in two installments, for reasons that will become apparent in a little while.

The indictment says this:

"The Grand Jury charges:

"1. From on or about the 1st day of January, 1974, and continuously thereafter up to and including the 2nd day of July, 1974, in the Southern District of New York, Elva Morales, the defendant, and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate" -- and then they list the sections of the

United States Code, which are the statutes I told you about, and for our purposes they are the statutes forbidding dealing in cocaine or conspiring to deal in cocaine.

"2. It was part of said conspiracy that the said defendant unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances," etc., and what that means for us, as you know, is cocaine.

Then there is a heading "Overt Acts," and some more allegations under that. I am going to read them to you a little while later. As I say, I think the purpose of postponing that will be apparent as we go along.

Now coming to the heart of your concern, let me instruct you that in order to justify a conviction of the defendant on this charge, the Government must have established beyond a reasonable doubt each and every one of three essential elements. I say each and every one, because if any one of these is not established, you must acquit the defendant.

These are the three essential elements: first, that at some time between the 1st of January and July 2, 1974, there was in existence a conspiracy of the kind the Government alleges, namely, a conspiracy for the unlawful distribution of cocaine or for the unlawful possession of

sometimes we say that a conspiracy is a kind of partnership in crime, you will understand that we are not using those familiar legal words -- agreement, partnership -- in their standard legal sense as they apply to lawful transactions. That is to say, as your common sense and experience will tell you, if people enter into a combination or agreement or a partnership to do some criminal thing, then much of what they say and do is liable to be informal, much is liable to be left to tacit, unexpressed understanding. There does not have to be the formality of an agreement or partnership as you would look for it in a business arrangement.

So you look to the pattern of alleged conduct and of alleged statements to see whether in the end they add up to the kind of agreement or kind of understanding or combination to violate the law that constitutes a conspiracy.

I have told you, and I repeat, that a conspiracy may be found to have existed even though the substantive offense is never completed. A conspiracy under the elements that I have given you and am now expanding on may be completed even though the ultimate goal or purpose or object of the conspirators was never carried out.

The jury's task in a conspiracy case, and yours in this case, is to go back over all the evidence that you have

heard, consider what it shows, consider what it does not show, and then, putting together the events as they existed, find out what happened, determine what happened, and decide whether on all those circumstances as you reconstruct them the Government has established beyond a reasonable doubt that the alleged conspirators did get together and agree, whether expressly or tacitly, to carry out the unlawful goal or purpose alleged in this indictment.

You will remember that the Government in this or any other case must prove the conspiracy it alleges and not some other conspiracy. You will also remember that in the language indictments frequently employ the accusation here is that the defendant conspired with others to the Grand Jury known and unknown. Those words have become more specific in the course of preparing this case for trial and in the actual trial, and I instruct you -- and I am sure you would understand this in any event -- that the conspiracy the Government must have proved in order to make out this first essential element is a conspiracy between Miss Elva Morales and Miss Lena Gottes, who was the first witness appearing on this trial. You will understand, obviously, that the charge of conspiracy could not be made out and is not intended to be made out by accusing Miss Morales of having conspired with George Brana, who was involved in these

events according to his testimony, because you also know that he was functioning as a Government agent, and you could not have a conspiracy between some non-Government person and an agent for the Government, who says he was and purportedly was engaged in the ascertainment of whether people were engaged in criminal conduct or ready to be engaged in criminal conduct.

Without laboring that any further, I repeat I instruct you that in order to establish this first essential element, since a person cannot conspire with himself or herself, on the record of this case the Government must have proved that there was a conspiracy of the kind alleged between Elva Morales and Lena Gottes.

If you find that such a conspiracy was established, the exact length of time for which it existed is not a matter of any special consequence. I say that because I have read to you the indictment, and if you wish you may look at it while you are deliberating, and you will notice and you will have heard that it alleges a conspiracy existing from about January 1 up to and including July 2, 1974. I am simply instructing you that the Government is not, again following the standard forms of indictment, required to prove a conspiracy that existed for the whole of that period of time. If it has shown a conspiracy as I

have defined it, it need only have shown that the conspiracy existed for some period of days or weeks within that overall period alleged in the indictment.

If you are not satisfied that there was a conspiracy between Miss Morales and Miss Gottes, your job is ended and you must acquit the defendant. On the other hand, if you are persuaded that there was such a conspiracy, you go on to the second essential element: You determine whether the Government has proved that Miss Morales participated in that conspiracy.

You will see here right away that this is a rather redundant and duplicative instruction in the circumstances of this case. I have already told you that in order to find a conspiracy you must find that there was an unlawful combination or agreement between Miss Morales and Miss Gottes, the only two possible conspirators before you on the record of this case. Nevertheless, I go on and instruct you on this separate second essential element of membership, because it causes you, all of us, to address yourselves, to address ourselves, to a central requisite in the law to make out a crime of the kind here in question and helps you to understand the things you must decide one way or another.

So I instruct you that participation or membership is a separate essential element. Then in that connection I

also instruct you that the membership or participation of anyone in a conspiracy must be made out by evidence of that individual person's words and conduct at the times and places in question or considered in connection with the alleged words and conduct of other people and particularly of other people said to have been involved in the unlawful behavior in question.

Quite generally, you would understand, whether I told you this or not, that the things we say and the things that we do take on meaning and become understandable in light of things that other people say and do. If someone extends his hand and shakes it up and down, it either looks very foolish or it looks perfectly normal if there is another hand extended from some other person shaking up and down as they clasp each other at the same time. Similarly, when people say things and do things as I have said, they may become intelligible and their meaning may become apparent from the setting in which those statements and actions occur.

So you will consider the things Miss Morales is alleged to have done and said, together with the things that other people are alleged to have done and said, and you will consider what you find about these several things in putting together your conclusions as to whether the Government has

proved her participation in a conspiracy with Lena Gottes.

In general, to be a member of a conspiracy or a participant in it, a person must know the unlawful purpose and must knowingly, intentionally associate himself or herself with it. A person must have a specific criminal intent, that is, must have the intent to carry out the kind of criminal objective for which the conspiracy exists, before the person can be said to be a member or participant.

It is not enough merely that you associate with people who may be conspiring to commit a crime. Mere association does not make you a conspirator. It is not enough that you have knowledge that other people are engaged in or are planning to be engaged in criminal conduct. You must have both. You must have knowledge and association, and a purpose on the part of the person in question to assist by his or her own action to carry out the purpose for which the conspiracy has been formed.

The indictment alleges, the statute requires, that a conspirator in the setting of this statute must have acted knowingly and intentionally before there may be a conviction. The indictment alleges that Miss Morales intentionally and knowingly combined, conspired, and so on.

I have already told you that you cannot be a conspirator unless you know what you are doing and you mean

to be participating in the unlawful enterprise. So I am being somewhat repetitious again, but I instruct you particularly that those words "intentionally and knowingly" identify the critical element of criminal intent without which you could not have a conspiracy conviction or a conviction for most kinds of crimes under our system of law.

Although I have really dwelt on this rather specifically, let me mention to you in general the meaning of those words.

We say that somebody acts intentionally and knowingly if the person acts deliberately and purposely and consciously and not inadvertently or by mistake or without an awareness of what he or she is doing or accidentally. I have told you that to act intentionally and knowingly in this context means to act with a specific criminal intent.

It is not required, obviously, that the person be shown to have known of the particular statute that is alleged to have been violated. But the person, to have this requisite criminal intent, must be shown to have acted with an awareness that the conduct was forbidden somehow by the criminal law.

Finally, let me remind you of something that I imagine is also obvious: that knowledge or intent or motive

are conceptions that relate to the state of a person's mind. That is a fact, the state of someone's mind, but it is the kind of fact with respect to which we don't commonly normally have so-called direct evidence. You cannot look at somebody's mind and see his or her intent or motives. You may have direct evidence in some situations in the form of a person's reporting the state of his or her mind.

But very commonly, in the courthouse and elsewhere, when we are making judgments about the state of somebody's mind, we are relying on so-called circumstantial evidence. We look at what the person does and says; we look at the person and whatever we know about that person, his or her age and maturity or immaturity; we look at all the circumstances surrounding the conduct. It is on the basis of such circumstantial evidence that we decide what the person desired or intended.

So here, and in most criminal cases, in deciding whether the Government has proved knowing and intentional conduct, you will take into account all the circumstances as they have been portrayed to you and as you find them, and decide whether the Government has established that requisite factor in its case.

I have covered the first two of the three essential elements -- conspiracy and membership, as we call them for

shorthand -- and I told you that if both of those are shown, you are still not able to convict until or unless you are convinced beyond a reasonable doubt that at least one of the alleged overt acts was committed during this conspiracy and in furtherance of it.

Let me just say two or three words about the purpose of that requirement. In general, it has been the theory of our law that people ought not to be found to be criminal for mere spoken desires without any steps toward implementing those desires to do some unlawful thing. In I hope simpler English, people can get together and say maybe they ought to commit some kind of crime and then stop and not do or say a single thing to move toward that criminal objective.

It is a general principle in our law -- and it applies here -- that if that is all that happened, if there are no overt acts, you could not have the crime of conspiracy. So you have this essential additional element: the requirement of proof of at least one overt act.

The overt act does not have to be something which in itself is a crime, but it must be something that is done by one or more of the conspirators with the purpose of carrying out the unlawful objective, with the purpose of implementing the conspiracy.

Commonly the Government in an indictment alleges more than one overt act, but I remind you that only one needs to be proved. If there is not proof of at least one, however, you must acquit.

Having told you those things, let me simply read to you these overt acts alleged in this indictment and leave it at that, reminding you that unless one of these has been proved, you may not convict.

There are three overt acts alleged here, and they are as follows:

"1. On or about April 12, 1974, the defendant Elva Morales spoke with a man by telephone.

"2. On or about April 12, 1974, defendant Elva Morales and a second female received a sample of cocaine from a man at the Skyline Motor Inn, 10th Avenue and 50th Street, New York, New York.

"3. On or about April 12, 1974, defendant Elva Morales negotiated to purchase approximately 3 pounds of cocaine for $39,000 at the Skyline Motor Inn, 10th Avenue and 50th Street, New York, New York."

One of those must be proved before you could find the third essential element.

So those are the things that you willl be addressing in deciding whether the Government has proved its

case.

Turning from those, I want to say to you a few things about problems in your deliberations and one or two things rather generally about the evidence, and then we will be through with these instructions.

It is a standard thing in instructions, and we follow the standard here, to remind the jurors of another obvious matter: that you are going to be concerned with so-called problems of credibility when you go to the jury room. You rely in our system on the accounts of witnesses for your understanding or knowledge of the events to which the case relates. So, very simply, you must appraise credibility, that is, you must make judgments about the extent to which the accounts given to you by these witnesses are reliable, are acceptable and should be accepted in your judgment, and that is the subject of credibility.

It is, as I say, a regular component of jury instructions, as it should be, but it is not a legal specialty. Lawyers and judges are not especially expert in deciding questions of credibility, or at least our system of jury trials is based on the premise that this is not a matter of legal expertise. We bring to the courthouse lay people likeyourselves, who are lay men and lay women in legal matters, and we expect -- and the expectation is regularly

satisfied -- that these people will soberly and seriously bring to the judgment of credibility their collective wisdom and experience and understanding, their familiar ways of sizing up people and determining the extent to which those people are reliable reporters of the things that they tell about.

You will be doing that. You will be reviewing the things you heard and the people from whom you heard them, and you will be asking yourselves with respect to each witness: Did the witness seem candid, frank, forthright, truthful, or did the witness seem evasive or shifty or suspect in some respect or other? Did the witness seem to you to know what he or she was talking about, and, at least equally importantly, did the witness appear to have an intention to tell the contents of that knowledge accurately and truthfully? Was the witness consistent or self-contradictory? How did the testimony of one witness fit in with the testimony of others?

You will remember that this is a matter of sizing up the individual witness, one separate human being at a time. Nobody starts out here ahead or behind because of his or her status or who called that person to the witness stand. The witnesses, as I think we talked about Tuesday, all start out equal, and now the question is, How did they wind up

and what is your judgment as to each one and as to the story that each one told?

If a witness in your judgment deliberately lied to you, deliberately gave you false testimony about some matter of importance in the case, it is part of your sovereign prerogatives as jurors to decide whether you wish to reject all the testimony of that witness, or you may accept and use and consider such parts of it as seem to you to be reliable and acceptable for purposes of your serious task of seeking a verdict.

If you find contradictions within the testimony or between the testimony of one witness and another, you will of course want to weigh them. Were they contradictions about some vital and central matter, or were they contradictions about some relatively insignificant or peripheral matters of detail? And you will take that into account in weighing credibility and in eventually reconstructing the events of this case.

All of us are familiar with the habit of considering the interest of a person in deciding his or her credibility. How may a person be affected by his own goals or objects in what he or she is telling us, and how might that bear on the credibility of that person?

One regular problem in criminal cases which relates

to the matter of interest is the problem of accomplice testimony. And I say a few particular words about that.

You know that the first witness you heard, Miss Lena Gottes, came here and told that she was an accomplice of Miss Morales, that she and Miss Morales were acting together in the ways you heard Miss Gottes tell about with the unlawful interests that Miss Gottes described in her testimony.

Again, as a matter of your common personal experience, you will know that the Government, the prosecution in criminal cases, frequently deems itself obliged to rely on accomplices of persons who say that they themselves committed crimes, in order to undertake to apprehend or convict others so engaged. The Government frequently takes the position that it must accept and present the witnesses as it finds them in its effort to enforce the criminal laws. There is no dispute about that as a general proposition. There is no dispute about the propriety of using accomplices generally in this fashion.

You are instructed, however -- and I assume that the arguments yesterday afternoon reminded you of this point, in any event -- that you must scrutinize the testimony of such an accomplice witness with particular care and deal with it with special caution in determining whether and how

far it is credible. Specifically, you will want to take into account, when you consider Miss Gottes, the evidence you have heard and the arguments you have heard about what her motives were or may have been in coming here and giving the testimony you heard. You heard that she had been promised that she would not be prosecuted any more for the things about which she told. You heard that she has had a severe prison sentence imposed on her, that she has pending an application for a reduction of that sentence, and that this may generate an interest in her which may in some way affect the testimony she came here and gave.

You want to consider these things in deciding her credibility. Was the testimony that she gave a fabrication in whole or in part, induced by benefits that she had been promised or might be hoping for? Was she lying because she had a promise of some kind or even a belief that lying might result in her getting favorable consideration in connection with her own very serious difficulties with the law? Or did she as a matter of conscience or in her own appraisal of her own interests decide that she should come here, take the witness stand, and obey the oath to tell you the truth about the things with respect to which she testified?

As to her hope for a reduction of her prison

sentence, you may consider, again, did she believe that she would best help herself in the fulfilment of that hope by formulating false accusations against Miss Morales and coming here and presenting those, or did she believe, on balance, that it was in her best self-interest to come here and undertake to testify truthfully?

Obviously, these are vital questions, and I don't attempt to retrace the arguments on one side and the other with which counsel have addressed these questions. It all goes, in the end, to the question of Miss Gottes' interest, and that in turn goes to the ultimate question of her credibility.

I have dwelt on it because it is a matter of law that it should be and it is properly so, but you will understand that, in the end, interest is a factor to be reckoned with all the other factors in determining credibility. Obviously, interest alone does not mean that the person is unreliable. If it meant that, we would never call interested witnesses. It does mean that it is something for you to reckon with, along with all the other things you must reckon with, in appraising the testimony of Miss Gottes.

Indeed, all witnesses or many witnesses in varying degrees may have or seem to have some possible interest in the case. You heard about that with respect to Mr. Brana.

The law enforcement people have an interest in vindicating their positions. With every witness, as I say, and in whatever degree in the end seems useful to you, you will appraise interest and all the other things and decide credibility.

When you go to the juryroom to do that and the other serious things that are your responsibility, there will be twelve of you, and that means, as the system contemplates, that you will go there to reason together. It means that each of you will feel not only entitled but obliged to contribute your wisdom and your thought to that joint enterprise. It means, by the same token, that you will go to the juryroom prepared to listen attentively and respectfully to the views of your fellow jurors.

If you have a position at some point in the deliberations and later on you are convinced rationally it was wrong, you won't hesitate to change your mind. On the other hand, if you have a position and in your rational judgment and in the exercise of your conscience it is correct, you are not to give it up simply because you happen at some particular point to be in a minority.

I think you know, but I remind you anyhow, that in order to reach a verdict either way, you must be unanimous. But the unanimous verdict of a jury is the vote

in the last analysis of each individual member of that jury, exercising his or her judgment and following his or her conscience.

I think counsel mentioned to you, and I repeat, if you find during your deliberations that you need any of the exhibits or you need to hear any of the testimony again or you need to hear any of these instructions again, send us a note about that through your forelady and we will undertake to supply whatever need you have as quickly as we can.

If at some point you are sending us a note, and if at that point, as is common, you are divided in your opinion, don't tell us the score, don't tell us how the vote stands. That is a private matter for the jury and one on which counsel and the Court should not be invited to intrude.

If and when you reach a verdict, plan to report it orally in the courtroom through your forelady, and your verdict will, of course, be guilty or not guilty on the single count in this indictment.

Those I think are your instructions, but let me inquire whether there are any exceptions or any additional things that counsel wish me to touch upon.

Mr. Davis?

MR. DAVIS: No, your Honor.

THE COURT: Do you want to come to the side bar?

Mr. Concannon?

MR. CONCANNON: Nothing, your Honor.

THE COURT: In that case, since the first twelve jurors that we empaneled have survived this task up to now, it becomes my job to excuse and to thank the two gentlemen who have served patiently with us as alternates.

Mr. Torres and Mr. Mico, you know the purpose of having alternates, and I trust you concur in the view that it is just as well we did not suffer injury or anything worse requiring you to fill in, but your job is ended. Mr. Swanciger tells me that your term of service is completed now, and he will hand you your cards. With that, let us excuse you and give you our good wishes. Good morning, gentlemen.

(The two alternate jurors left the courtroom.)

THE COURT: And now, if we can have the marshal sworn, the jury may be permitted to retire.

(The marshal was sworn.)

(At 11:59 a.m., the jury retired to deliberate upon a verdict.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

- v - :

LIONEL MARQUES, a/k/a Chile Marques, :
LENA RUBY GOTES-CONTRERAS, :
WILLIAM CHAIN, :
JUAN CARLOS SARMIENTO-DIAZ, :
GUILLERMO SAAVEDRA, a/k/a Chito, :
CARMEN MIRANDA, :
JAIME LEYTON, :
RAMON VARAS-ROJAS, :
MARCOS AGUIRRE, :
EDUARDO DIAZ, :
LUISA DIAZ, :
ELVA MORALES, :
MARION BROWN, :
JUAN VALLADARES, :
JOHN DOE DIAZ, a/k/a El Chocosa, :
JOHN DOE, a/k/a One Eyed Fidel, :
JOHN DOE, a/k/a Robin, and :
JOHN DOE, a/k/a Luis, :

Defendants. :

- - - - - - - - - - - - - - - - - - - -x

74 CRIM. 576

INDICTMENT

74 Cr.

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of July, 1970, and continuously thereafter up to and including the date of the filing of this Indictment, in the Southern District of New York and else where, LIONEL MARQUES, a/k/a Chile Marques, LENA RUBY GOTES-CONTRERAS, WILLIAM CHAIN, JUAN CARLOS SARMIENTO-DIAZ, GUILLERMO SAAVEDRA, a/k/a Chito, CARMEN MIRANDA, JAIME LEYTON, RAMON VARAS-ROJAS, MARCOS AQUIRRE, EDUARDO DIAZ, LUISA DIAZ, ELVA MORALES, MARION BROWN, JUAN VALLADARES, JOHN DOE DIAZ, a/k/a El Chocosa, JOHN DOE, a/k/a One Eyed Fidel, JOHN DOE, a/k/a Robin, JOHN DOE, a/k/a Luis, the defendants, and Wladimir Banderas named as a co-conspirator, and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections

812, 841(a)(1), 841(b)(1)(A), 952(a), 960(a)(1) and 960(b)(1) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants and co-conspirator unlawfully, intentionally and knowingly would import into the United States from places outside thereof large quantities of cocaine, a Schedule II narcotic drug controlled substance, the exact amount thereof being unknown, in violation of Sections 812, 952(a), 960(a)(1) and 960(b)(1) of Title 21, United States Code.

3. It was further part of said conspiracy that the said defendants and co-conspirator unlawfully, intentionally and knowingly would distribute and possess with intent to distribute large quantities of cocaine, a Schedule II narcotic drug controlled substance, the exact amount thereof being to the Grand Jury unknown, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

THE DEFENDANTS*

The Sources of Supply

4. Defendants JOHN DOE DIAZ, a/k/a El Chocosa, JOHN DOE, a/k/a One Eyed Fidel, and JUAN VALLADARES were suppliers of cocaine in and around the city of Valparaiso, Chile.

The Financiers

5. Defendants WILLIAM CHAIN and JUAN CARLOS SARMIENTO-DIAZ lived in and around Valparaiso, Chile and defendants GUILLERMO SAAVEDRA, a/k/a Chito and MARCOS AGUIRRE lived in Santiago, Chile. All were able to obtain narcotics and organize and finance narcotics smuggling operations into the United States.

6. Defendant CARMEN MIRANDA lived in Santiago, Chile and had contacts in the United States for the purchase of narcotic drugs.

* The descriptions herein relate to the period of the Indictment.

The Smugglers

7. Defendant JAIME LEYTON was a Chilean Naval Officer stationed in Valparaiso, Chile with access to diplomatic pouches transported between Valparaiso and Santiago, Chile and to Washington, D.C.

8. Defendant RAMON VARAS-ROJAS was a serjeant or other member of the Chilean Air Force at Los Cerrillos, the military airport in Santiago, Chile who had access to military flights between Chile and the United States.

The Receivers

9. Defendant EDUARDO DIAZ was a Chilean Naval Attache stationed in Washington, D.C. who had access to Chilean diplomatic pouches sent between Chile and Washington, D.C.

The Buyers

10. Defendant LENA RUBY GOTES-CONTRERAS lived in New York and travelled to Washington, D.C. to receive the narcotics after it had been smuggled into the United States.

11. Defendant LIONEL MARQUES, a/k/a Chile Marques, lived in New York and was the major purchaser and reseller in New York of the cocaine smuggled from Chile to Washington, D.C. and delivered to defendant LENA RUBY GOTES-CONTRERAS.

THE MEANS OF THE CONSPIRACY

12. Defendants WILLIAM CHAIN, JUAN CARLOS SARMIENTO-DIAZ, GUILLERMO SAAVEDRA, a/k/a Chito, and MARCOS AGUIRRE and co-conspirator Wladimir Banderas obtained more than 138 pounds of cocaine from defendants JOHN DOE DIAZ, a/k/a El Chocosa, JOHN DOE, a/k/a One Eyed Fidel, and JUAN VALLADAREZ in Chile and arranged to have the cocaine smuggled into the United States.

13. On at least three occasions defendant JAIME LEYTON, stowed four kilograms of cocaine in Chile in diplomatic pouches which were then transported to Washington, D.C. and passed through United States Customs. In Washington, D.C.

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the cocaine was removed from the diplomatic pouches by defendant EDUARDO DIAZ and retained until it was delivered to defendant LENA RUBY GOTES-CONTRERAS. On other occasions defendant RAMON VARAS-ROJAS secreted at least fifty kilograms of cocaine on Chilean military aircraft which flew from Santiago, Chile to Washington, D.C. In Washington, D.C., VARAS-ROJAS removed the cocaine from the airplanes and stored it in a house until it was delivered to defendant LENA RUBY GOTES-CONTRERAS.

14. On at least five occasions defendant CARMEN MIRANDA, arranged for defendant LENA RUBY GOTES-CONTRERAS to receive large quantities of cocaine in the United States. On these occasions defendant LIONEL MARQUES, a/k/a Chile Marques, purchased the cocaine with the purpose of reselling it from LENA RUBY GOTES-CONTRERAS in New York City. The money paid from MARQUES to GOTES-CONTRERAS for the purchase of the cocaine was smuggled back to the financiers in Chile secreted by EDUARDO DIAZ in cigarette cartons carried in Chilean Naval Diplomatic pouches from Washington.

OVERT ACTS

In pursuance of this conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

(1) In or about May and July, 1973, defendants WILLIAM CHAIN, CARLOS SARMIENTO and co-conspirator Wladimir Bandera arranged to smuggle twelve kilograms of cocaine into the United States from Chile.

(2) In or about May and July, 1973, defendant JAIME LEYTON smuggled twelve kilograms of cocaine to defendant EDUARDO DIAZ in Washington, D.C. hidden in Chilean Naval Diplomatic pouches.

(3) In or about May and July, 1973, defendant LENA RUBY GOTES-CONTRERAS received twelve kilograms of cocaine in Washington, D.C. and defendant LIONEL MARQUES

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a/k/a Chile Marques purchased twelve kilograms of cocaine in New York.

(4) In or about July, 1973, defendant GUILLERMO SAAVEDRA, a/k/a Chito, and co-conspirator Wladimir Bandera arranged to smuggle ten kilograms of cocaine into the United States from Chile.

(5) In or about July, 1973, defendant RAMON VARAS-ROJAS smuggled ten kilograms of cocaine into the United States secreted on a Chilean Military aircraft.

(6) In or about July, 1973, defendant LENA RUBY GOTES-CONTRERAS received ten kilograms of cocaine in Washington, D.C., and LIONEL MARQUES, a/k/a Chile Marques purchased ten kilograms of cocaine in New York.

(7) In or about November, 1973, defendants GUILLERMO SAAVEDRA and RAMON VARAS-RAJOS smuggled forty kilograms of cocaine into the United States.

(8) On or about February 5 and 6, 1973, defendant LENA RUBY GOTES-CONTRERAS delivered $10,000 to a man in New York as partial payment for the purchase of four kilograms of cocaine.

(9) On or before February 9, 1973, defendant LENA RUBY GOTES-CONTRERAS sent $54,000 to defendants EDUARDO DIAZ and LUISA DIAZ in Washington, D.C. as partial payment for four kilograms of cocaine.

(10) On or about February 13, 1973, defendants EDUARDO DIAZ and LUISA DIAZ possessed a shopping bag containing $52,980.

(11) On or before February 19, 1973, defendant EDUARDO DIAZ arranged to smuggle $52,230 from the United States to Chile secreted in Salem cigarette packages and carried in a diplomatic pouch.

(12) On or about February 24, 1974, defendant WILLIAM CHAIN received $52,230 in partial payment for four kilograms of

cocaine.

(13) On or about March 28, 1974, defendant GUILLERMO SAAVEDRA, a/k/a Chito, possessed 1400 grams of cocaine which he delivered to a man in Chile.

(14) On or about April 1, 1974, defendant MARCOS AGUIRRE possessed 250 grams of cocaine which he delivered to a man in Chile.

(15) On or about April 11, 1974, defendant ELVA MORALES and a second female received a sample of cocaine from a man.

(16) On or about April 15, 1974, defendant LENA RUBY GOTES-CONTRERAS and JOHN DOE, a/k/a Robin, possessed approximately 27.5 kilograms of cocaine at C and G Cleaners, 1253 St. Nicholas Avenue, New York, New York.

(17) On or about April 16, 1974, defendants LENA RUBY GOTES-CONTRERAS and LIONEL MARQUES, a/k/a Chile Marques, drove in an automobile to meet with a man to arrange to receive a quantity of cocaine.

(18) On or about April 16, 1974, defendant LIONEL MARQUES, a/k/a Chile Marques met with defendants LENA RUBY GOTES-CONTRERAS and JOHN DOE a/k/a Luis on the Southwest corner of 97th Street and Broadway, New York, New York.

(19) On or about April 16, 1974, defendant JOHN DOE, a/k/a Luis entered a building at 320 West 96th Street, New York, New York.

(20) On or about April 17, 1974, defendants LIONEL MARQUES, a/k/a Chile, and LENA RUBY GOTES-CONTRERAS drove to C and G Cleaners, 1253 St. Nicholas Avenue, New York, New York.

(21) On or about April 17, 1974, defendant LENA RUBY GOTES-CONTRERAS delivered $4600 to a man.

(22) On or about April 22, 1974, defendant LENA RUBY GOTES-CONTRERAS delivered $700 to a man.

(Title 21, United States Code, Sections 846 and 953.)

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COUNT TWO

The Grand Jury further charges:

In or about May, 1973, in the Southern District of New York, CARLOS SARMIENTO, WILLIAM CHAIN, CARMEN MIRANDA, JAIME LEYTON, EDUARDO DIAZ, LUISA DIAZ, LENA RUBY GOTES-CONTRERAS and LIONEL MARQUES, a/k/a Chile Marques, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately four kilograms of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

COUNT THREE

The Grand Jury further charges:

In or about May, 1973, in the Southern District of New York, CARLOS SARMIENTO, WILLIAM CHAIN, CARMEN MIRANDA, JAIME LEYTON, EDUARDO DIAZ, LUISA DIAZ, LENA RUBY GOTES-CONTRERAS and LIONEL MARQUES, a/k/a Chile Marques, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately four kilograms of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

COUNT FOUR

The Grand Jury further charges:

In or about July, 1973, in the Southern District of New York, GUILLERMO SAAVEDRA, RAMON VARAS-ROJAS, CARMEN MIRANDA, LENA RUBY GOTES-CONTRERAS, and LIONEL MARQUES, a/k/a Chile Marques, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately ten kilograms of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

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COUNT FIVE

The Grand Jury further charges:

On or about the 16th day of April, 1974, in the Southern District of New York, LIONEL MARQUES, a/k/a Chile Marques, LENA RUBY COTES-CONTRERAS, JOHN DOE, a/k/a Luis, GUILLERMO SAAVEDRA and MARCOS AGUIRRE, the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule II controlled substance, to wit, approximately 235 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

FOREMAN

Paul J. Curran

PAUL J. CURRAN
United States Attorney

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

LIONEL MARQUES, a/k/a
Chile Marques,
LENA RUBY GOTES-CONTRERAS,
WILLIAM CHAIN,
JUAN CARLOS SARMIENTO-DIAZ,
et al.,

Defendants.

INDICTMENT

21 U.S.C. §§812, 841(a)(1),
841(b)(1)(A), 952(a), 960(a)(1),
960(b)(1), 846, 953 and
18 U.S.C. §2.

PAUL J. CURRAN

United States Attorney

A TRUE BILL

Foreman

FPI—88—1-13-70—20M—4925

JUN 6 1974 Deft. & Indictment ar
Sealed.

JUL 1 1974 Indictment ordered sealed
and filed

JUL 8 1974 Deft Ferreira appe
(except Stone parat) Deft
Motions to be made by 7-31-74.
Assigned to Frankel, J. Bail
by Court at $25,000 Cash
Deft remanded in lieu

L 8 1974 Deft Marcus appears (Atty Joseph Lee Present) Deft pleads Ng. Bail Con't as previously fixed by the Magistrate at $50,000 Cash. Deft remanded in Lieu of Bail

Ward J.

8 1974 Deft Estes - Contreras appears (Atty Gary Feldman appears) Deft pleads Ng. Bail Con't as previously fixed by the Magistrate at $50,000 Cash. Deft remanded in Lieu of Bail

Ward J.

L 8 1974 Deft Morales appears (Atty Thomas Lorenzen, Legal Aid appears) Deft pleads Ng. Bail Con't as previously fixed by the Magistrate at $15,000 PRB to be secured by $1,500 Cash

Ward J.

MR

July 11, 1974 - Def't Lionel MARQUEZ Bail App. (Atty J. Stoveper)
Bail Fixed at $150,000 to be secured by $7500 CASH OR
SECURITY $75,000 P.R.B.
Def't to be released by Lionel MARQUEZ SR, Lionel
MARQUEZ JR (Def't) and Fernando MARQUEZ,
Def't remanded in Lieu of Bail

WARD J.

AUSA LITTLEFIELD.

JUL 2 1974 Def GOTES-CONTRERAS had modified as following;
Def to post a cash bail in amt of $6,000.00
Mr Eli Bardin's properties worth $3 then to be
posted as security.
Def to post his interest in Cleaning Establishment
Mr Eli Bardin and Def to ~~sign~~ sign a
P.R.B in amt of $100,000.00. Def is to stay
within County of Manhattan unless otherwise
enlarged. Def to telephone AUSA Littlefield daily.
Def to report physically on Friday of each
week to AUSA Littlefield Pmc.

Frankel J.

(RW)

JUL 29 1974

Def Pmc. appears (Atty D. Eisenberg
appears) Def pleads G/G Case referred to
Frankel J. 10 days for retrial. Def to
be P/R Def fail

Stewart J.
(RW)

11-4-74 Dft CONTRERAS, atty (JERRY FELDMAN) pres. enters plea of Guilty to counts 1, 2 & 5. P.S.I ordered. Dft contd on present bail until 10 AM, Nov 18, 1974, at which time she is to be remanded pending sentence scheduled for Nov 29, 1974.

Frankel J.
(RW)

NOV 29 1974 AUSA DAVIS
INTERPRETER - CARMEN ALMODRITTA [illegible]
Sentencing of dft CONTRERAS, atty pres, adjourned until a later date to be set by the Court.
d

Frankel J.
(RW)

AUSA LITTLEFIELD
DEC 2 1974 Dft CONTRERAS, atty pres, sentenced to 9 yrs on cts 1, 2 & 5 to run concurrently. 5 yrs Spec. Parole to follow upon release from confinement. Ct 3 & 4 dismissed on motion
d

Frankel J.
(RW)

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n-995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- v -	:	74 Cr. 576 (MEF)
LIONEL MARQUES, a/k/a Chile Marques, et al.,	:	
Defendants.	:	

MEMORANDUM OF LAW

Preliminary Statement

This memorandum is respectfully submitted in response to the various motions of the defendants.

Indictment 74 Cr. 576 was filed in five counts on June 6, 1974 and unsealed on July 1, 1974. It names nineteen defendants. Six defendants have been apprehended in the United States. The present motions are made by five of the apprended defendants each of whom has pleaded not guilty. The answers to the motions for Discovery and Inspection and Bill of Particulars and the order in which they will be answered are set forth below:

(1) STATEMENTS OF THE DEFENDANTS

The defendants Marques, Ferreiro, Gotes-Contreras and Morales seek to inspect any statements made by the

defendants in so far as his or her own individual statements are concerned. The Government consents to permit each defendant to inspect his or her own statements before the Grand Jury, if applicable, and any other statements that are in the possession, custody or control of the Government, the existence of which is known, or by the exercise of due diligence may become known to the Government. The Government also consents to allow discovery and inspection of any such statement of defendant Brown, although he has not moved for such discovery.

(2) THE MOTION FOR THE PRODUCTION OF FAVORABLE AND EXCULPATORY MATERIAL TO THE DEFENDANTS SHOULD BE DENIED EXCEPT INSOFAR AS CONSENTED TO BY THE GOVERNMENT

The defendants Gotes, Contreras and Morales move for pre-trial discovery of all exculpatory evidence and favorable material in the possession of the Government. The defendants' request is based on Brady v. Maryland, 373 U.S. 83 (1963). The Brady case does not address itself to pre-trial discovery. Moreover, as Brady and its progeny have indicated, disclosure is limited to a narrow category of evidence which bears vitally on the controlling issues in the case. See, e.g. United States ex rel. Meers v. Wilkins, 326 F.2d 135, 139-40 (2d Cir. 1964). In United States v. Manhattan Brush Co., 38 F.R.D. 4, 6 (S.D.N.Y.

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1965), Judge Palmieri made it abundantly clear that "no pre-trial remedies were intended to be created" by Brady:

> "The Brady decision must be understood to refer to the application of tests of fairness to the prosecution at trial, and not to an earlier point in the proceedings." Accord, United States v. Gleason, 265 F. Supp. 880 (S.D.N.Y. 1967).

It is equally clear that Brady imposes no pre-trial obligation on either the Government or the Court. United States v. Armantrout, 278 F. Supp. 517, 518 (S.D.N.Y.), aff'd., 411 F.2d 60 (2d Cir. 1969); United States v. Birrell, 276 F. Supp. 798 (S.D.N.Y. 1967); United States v. Cobb, 271 F. Supp. 159 (S.D.N.Y. 1967).

The Government's responsibility to disclose exculpatory material does not arise until trial, after the issues and Government's proof have crystalized. United States v. King, 49 F.R.D. 51 (S.D.N.Y. 1970). Any other rule puts an impossible burden on the Government to determine before the trial what evidence is favorable as well as relevant. United States v. Ruggiero, 472 F.2d 599, 605 (2d Cir.), cert. denied, 412 U.S. 939 (1973); United States v. Moore, 439 F.2d 1107, 1108 (6th Cir. 1971). As Judge Wyatt stated in United States v. Zive,

299 F. Supp. 1273, 1274 (S.D.N.Y. 1969):

> "Brady v. Maryland, did not deal in any way with pre-trial discovery by a defendant nor with any duty of the Court in that respect. On the contrary, the discussion was of the duty of the prosecutor, wholly apart from any order of the Court. [N]o pre-trial remedies were intended to be created by Brady. [Citation omitted]

See also United States v. Wolfson, 289 F. Supp. 903, 914-5 (S.D.N.Y.) aff'd., 405 F.2d 779 (2d Cir. 1968); United States v. Leighton, 265 F. Supp. 27, 35 (S.D.N.Y.), aff'd., 386 F.2d 822 (2d Cir. 1967), cert. denied, 390 U.S. 1025 (1968); United States v. King, 49 F.R.D. 51, 53-54 (S.D.N.Y. 1970).

Defendants make no showing that the Government will not honor its obligation under Brady at the appropriate time nor do they set forth any factual basis for any belief that the Government has such information. For this reason alone the motion should be denied. As the Court of Appeals for the Second Circuit has held, "Neither Brady v. Maryland,... nor any other case requires the Government to afford a criminal defendant a general right of discovery." United States v. Evanchick, 413 F. 2d 950, 953 (2d Cir. 1969).

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In any event, the Government is well aware of its obligation under the Brady directive and accordingly consents to provide the moving defendants as well as defendants Marquez, Ferreiro and Brown, with any favorable and exculpatory material that may exist at the proper time of trial or within a reasonable time before trial should it appear that the material on its face is favorable or exculpatory to the defendant.

For the reasons stated above, the motion of the several defendants for Brady material should be denied except as consented to by the Government.

(3) THE GOVERNMENT CONSENTS TO DISCLOSE THE CRIMINAL RECORDS AND PENDING INDICTMENTS OF GOVERNMENT WITNESSES

Defendants Marquez, Ferreiro, Gotes-Contreras, and Morales move to discover the criminal records and any pending indictments of Government witnesses. In addition, defendant Morales seeks any psychiatric and medical reports of the aforementioned witnesses.

The Government consents to disclose to all the defendants the criminal records and convictions of all Government witnesses, as well as any indictments pending against such witness and any psychiatric and medical reports, if they exist pertaining to said witnesses at the appropriate time.

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(4) THE GOVERNMENT CONSENTS TO DISCLOSE ANY SCIENTIFIC TESTS AND RESULTS

Defendants Marques, Gotes-Contreras, Morales and Ferreiro move for the discovery and inspection of any scientific tests and results thereof which the Government conducted in the preparation of this case. In addition, defendant Gotes-Contreras seeks to discover and inspect any tests and results of fingerprint analysis.

The Government consents to disclose and will furnish to all defendants copies of chemists reports which include the narcotic analysis and results of tests conducted by the Government. With respect to fingerprint tests and results, the Government at this time it has no knowledge of the existence of any fingerprint analysis requests or results. However, if the Government does discover such fingerprint tests and results, it will, apprise defense counsel of such tests and will turn over related reports at the proper time.

(5) THE GOVERNMENT CONSENTS TO MAKE AVAILABLE ALL WRITTEN AND RECORDED AGREEMENTS AND STATEMENTS OF PROMISES, REWARDS, OR INDUCEMENTS TO ANY GOVERNMENT WITNESSES

Defendants Gotes-Contreras and Morales move for the discovery and inspection of statements of promises, rewards, or inducement made to any Government witness.

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The Government consents to permit the defendants to discover and inspect any written or recorded agreements and statements of promises, rewards or inducements made to any Government witnesses at the appropriate time.

(6) THE MOTION FOR THE PRODUCTION OF TAPES, TRANSCRIPTS AND NOTES RESULTING FROM ELECTRONIC SURVEILLANCE IS CONSENTED TO BY THE GOVERNMENT

Defendants Marques, Gotes-Contreras, Morales and Ferreiro move for the discovery and inspection of any electronic eavesdropping material such as transcripts, tapes, notes and recordings, also for the disclosure of any warrants and orders and applications for warrants and orders in the gathering of such material.

At this time, the Government knows of no order, warrant or application for a warrant and order to gather such material. However, kel body transmitters and other recording devices were used to record telephone conversations and face-to-face conversations involving the defendant and persons working on behalf of the government. The Government consents to provide the defendants in advance of trial with the tapes and transcripts prepared from the tapes on the condition that defendants before trial examine the transcripts and either prepare their own corrections to the transcript, or agree that they are accurate transcripts.

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(7) THE MOTION TO DISCOVER DOCUMENTS AND PHYSICAL EVIDENCE SEIZED FROM A DEFENDANT BY SEARCH AND SEIZURE SHOULD BE DENIED EXCEPT AS CONSENTED TO BY THE GOVERNMENT

Defendants Marques, Gotes-Contreras and Ferreiro move for discovery and inspection of all documents, personal items and physical evidence seized from the defendants at time of their arrests, also for the discovery and inspection of all documents, personal items and physical evidence seized by the Government as a result of a search and seizure order. In addition, defendant Gotes-Contreras moves for the discovery and inspection of all books, papers or documents obtained by the Government from the defendant in connection with the subject matter of this indictment. In addition defendant Morales moves for the discovery and inspection of all investigation reports in this case which were prepared by any law enforcement agency.

Finally, the defendants move for the suppression of the aforementioned evidence at trial.

The Government consents to permit each defendant at the appropriate time to discover and inspect any documents, personal items, and physical evidence which were taken from him or her by the Government at the time of arrest. The Government also, consents to permit the defendant to discover and inspect any search warrant together with the application for said warrant and return thereon. With respect the motion of defendants Gotes-Contreras

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and Morales seeking all books, papers or documents obtained by the Government and all investigative reports prepared by any enforcement agency in connection with the subject matter of this indictment, the Government respectfully submits that these requests go far beyond the rule of discovery.

Rule 16(b) provides for the discovery of documents upon a showing of materiality to the preparation of [the defense] and that the request is reasonable. A defendant is required to particularize in some manner the documents sought to make some showing of their materiality to the defense. See, e.g. United States v. Conder, 423 F.2d 904, 910 (6th Cir.), cert. denied, 400 U.S. 958 (1970); United States v. Jordan, 399 F.2d 610 (2d Cir.), cert. denied, 393 U.S. 1005 (1968); United States v. Louis Correau, Inc., 42 F.R.D. 408, 416 (S.D.N.Y. 1967); United States v. Crisona, 271 F. Supp. 150, 158 (S.D.N.Y. 1967). A request for all documents, exhibits, papers and tangible objects does not identify any documents and a fortiori does not explain the materiality of these unidentified documents. Presumably the defendants rely on a theory that all documents obtained by agents of the United States Government are material. This is not the law. That a document may have been material to the federal agent's investigation does not establish that it is material to the preparation of the defense. If such were the law, a

defendant would be entitled to not only all the evidence in the Government's possession but any and all material the Government obtained in the course of its investigation. See, United States v. Van Allen, 28 F.R.D. 329, 335-337 (S.D.N.Y. 1961). Obviously, were this the case, the provisions of Rule 16 and the Jencks Act would be rendered moot.

With respect to defendants' motion to suppress introduction of any personal items which were obtained from a defendant at the time of arrest and/or before arrest, the Government respectfully opposes such motion as being without merit. The personal items of the defendants in the possession of the Government resulted from a search incident to a legal arrest which was based on the present indictment. The Government has already stated that these items will be available for the defendants' discovery and inspection at the proper time. The Government at this time does not know whether it intends to introduce any of these items into evidence during the course of trial.

Accordingly, the Government consents to defendants' motions insofar as previously stated herein and respectfully requests that the Court deny the motion for suppression and also deny discovery and inspection of all books, documents and records of the defendant, and, all investigative reports files and documents prepared by any law enforcement agency.

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(8) THE DEFENDANTS ARE NOT ENTITLED TO THE NAMES AND ADDRESSES OF ALL GOVERNMENT WITNESSES AND PROSPECTIVE WITNESSES

Defendants Marques, Gotes-Contreras, Morales and Ferreiro move for the pre-trial discovery of the names and addresses of all Government witnesses. In addition, defendant Morales moves for the pre-trial discovery of the names and addresses of all persons interviewed by the Government.

The Government submits that the defendants are not entitled to that information at this time. United States v. Persico, 425 F.2d 1375 (2d Cir.), cert. denied, 400 U.S. 869 (1970). In Persico, the Second Circuit specifically stated that:

> "There is no obligation on the part of the government to inform the defense of the intention to call a witness when the indictment is for a non-capital offense." United States v. Persico, 425 F.2d 1375, 1378 (2d Cir.), cert. denied, 400 U.S. 869 (1970).

See also United States v. King, 254 F.Supp. 9, 16-7 (S.D. N.Y. 1966). Additionally, the other circuits are virtually unanimous in adherring to the Persico principle. See, e.g., United States v. Addonizio, 451 F.2d 49, 62 (3d Cir.), cert. denied, 405 U.S. 936, reh. denied, 405 U.S. 1048 (1972); United States v. Chase, 372 F.2d 453, 466 (4th Cir.), cert. denied, 387 U.S. 907, 913 (1967); United States v. Hancock, 441 F.2d 1285, 1286 (5th Cir.), cert.

denied, 404 U.S. 833, reh. denied, 404 U.S. 987 (1971); Carpenter v. United States, 463 F.2d 397, 402 (10th Cir.), cert. denied, 409 U.S. 985 (1972); United States v. Annorano, 460 F.2d 1303, 1310 (7th Cir.), cert. denied, 409 U.S. 852 (1972); United States v. Cole, 453 F.2d 902, 905 (8th Cir.), cert. denied, 406 U.S. 922 (1972); Rosenzweig v. United States, 412 F.2d 844, 845 (9th Cir. 1969). Consequently, the Government submits that the defendants' request for the names and addresses of witnesses is without merit.

The second motion of the defendant Morales requesting the names of all persons interviewed by the Government is likewise opposed by the Government. In essence, the request demands a compilation, the result of which is a non-discoverable list of prospective Government witnesses.

There are, to be sure, persons who were and are being interviewed and whose statements were and are preserved in government files. These persons are prospective witnesses. As such, their statements are not subject to pre-testimonial discovery, but are governed by Title 18, United States Code, Section 3500 and specifically excluded by Rule 16(b) from pre-trial discovery. United States v. Lewis, 266 F.Supp. 897, 899 (S.D.N.Y. 1967); Palermo v. United States, 360 U.S. 343, 350-51 (1959) and other cases cited in this Memorandum of Law.

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For the reasons stated above, the Government respectfully requests the Court to deny the defendants' motions for disclosure of names and addresses of Government witnesses and prospective witnesses except as consented to by the Government.

(9) THE DEFENDANTS ARE NOT ENTITLED TO STATEMENTS MADE BY PROSPECTIVE GOVERNMENT WITNESSES

Defendant Morales has moved to examine the statements and Grand Jury testimony of all prospective Government witnesses. Such motion is without merit. Such material will be turned over to trial pursuant to the Jencks Act, 18 U.S.C. §3500 and is expressly exempt from discovery under Rule 16(b) of the Federal Rules of Criminal Procedure. See e.g., Palermo v. United States, 360 U.S. 343, 350-51 (1959): United States v. Wilkerson, 456 F.2d 57, 61 (6th Cir.), cert. denied, 408 U.S. 926 (1972); Benefield v. United States, 370 F.2d 912, 914 (5th Cir. 1966); United States v. Hasiwar, 299 F.Supp. 1053, 1055 (S.D.N.Y. 1969): United States v. American Oil Co., 286 F.Supp. 742, 753 (D.N.J. 1968); United States v. Lewis, 266 F.Supp. 897 (S.D.N.Y. 1967); United States v. Louis Carreau, Inc., 42 F.R.D. 408, 416 (S.D.N.Y. 1967). Moreover, disclosure of Grand Jury testimony at this time would constitute a flagrant breach of Grand Jury secrecy and would improperly compel the Government to disclose the names of its witnesses in advance of trial.

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See, e.g., Dennis v. United States, 384 U.S. 855 (1966); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 398-400 (1959); United States v. Youngblood, 379 F.2d 365 (2d Cir. 1967); United States v. Gardner, 308 F.Supp. 425, 428 (S.D.N.Y. 1969); United States v. McCarthy, 292 F.Supp. 937, 942-43 (S.D.N.Y. 1968).

For the reasons stated above, the Government requests that the defendant's motion to examine statements made by prospective Government witnesses be denied.

(10) THE DEFENDANTS ARE NOT ENTITLED TO STATEMENTS MADE BY NON-WITNESSES

Defendants Gotes-Contreras and Morales move to have the Government disclose statements made by non-witnesses. This broad demand is unreasonable and should be denied.

The Government is not required in pre-trial discovery to select its final list of witnesses from those who have been interviewed, exclude those who will testify, and provide the statements of the remainder before the defendants. Further, unless those non-witnesses' statements fall within the rules regarding exculpatory material set forth in Brady v. Maryland, 373 U.S. 83 (1963), there is no legal basis for their production at any time.

Statements by third parties, who do not testify at trial and which do not exculpate the defendant are not discoverable. Palermo v. United States, 360 U.S. 343 (1959).

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Accordingly, the Government respectfully requests the Court to deny the defendants' motion to examine statements made by non-witnesses.

(11) THE MOTION BY DEFENDANT TO DISMISS THE INDICTMENT SUBJECT TO INSPECTION OF GRAND JURY MINUTES AND EXHIBITS SHOULD BE DENIED

Defendant Brown moves to dismiss the indictment, or in the alternative, to inspect the Grand Jury minutes and exhibits. In addition, defendant Morales moves for the discovery and inspection of all exhibits presented in the Grand Jury.

In these motions, defendants apparently are urging the Court to form a new rule of discovery allowing a defendant to obtain the Grand Jury minutes and exhibits in advance of trial so as to prepare a defense for trial, or, in the alternative, to determine if sufficient evidence was presented to the Grand Jury to warrant its issuance of the indictment. At this time, the Government consents to allow the defendant to inspect any Grand Jury exhibits (of which there are only photographs) relating specifically to each defendant. The Government does not consent to defendants' discovery of all Grand Jury exhibits.

In his motion, defendant Brown cites no relevant authority or point of law permitting inspection of Grand Jury minutes to determine if there was sufficient evidence for the issuance of the indictment. Instead, he totally

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ignores a plethora of cases squarely contrary to his position. It is abundantly clear that examination of transcript proceedings before the Grand Jury in order to permit defendant to ascertain the sufficiency of evidence on which an indictment was issued will not be allowed. See, Costello v. United States, 350 U.S. 359 (1956); United States v. Ramsey, 315 F.2d 199 (2d Cir.), cert. denied, 375 U.S. 883 (1963); United States v. Eskow, 279 F.Supp. 556, 558 (S.D.N.Y. 1968); United States v. Crisona, 271 F.Supp. 150, 159 (S.D.N.Y. 1967); United States v. DiSalvo, 251 F.Supp. 740, 746 (S.D.N.Y. 1966). Moreover, it is well established that in order to justify breaking the traditional secrecy of Grand Jury proceedings embodied in Rule 6(e), a defendant must demonstrate a particularized need. Dennis v. United States, 384 U.S. 855 (1966); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 396, 398-400 (1959); United States v. Ruggiero, 472 F.2d 599, 605 (2d Cir. 1973), cert. denied, 412 U.S. 939 (1973); United States v. Youngblood, 379 F.2d 365 (2d Cir. 1973); United States v. Chase, 372 F.2d 365 (2d Cir. 1967); United States v. Beck, 72 Cr. 216 (S.D.N.Y. Oct. 27, 1972); United States v. Monzaris, 69 Cr. 872 (S.D.N.Y. Feb. 3, 1970); United States v. Gardner, 308 F. Supp. 425, 428 (S.D.N.Y. 1969); United States v. McCarthy, 292 F.Supp. 937, 942-43 (S.D.N.Y. 1968); United

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States v. Van Allen, 28 F.R.D. 329, 335 (S.D.N.Y. 1961).

It is clear in the instant motion that the defendant has failed to meet a particularized need and that he has not even cited proper authority for his contention. The cases that he does cite are totally irrelevant for his discovery of Grand Jury minutes at the pre-trial stage. In addition, courts in this district have repeatedly denied defendants' motions for pre-trial disclosure of Grand Jury minutes, holding that defendants do not have "carte blanche to pry into the Grand Jury proceedings before trial in hope of finding something useful." United States v. Garcia, 272 F.Supp. 286, 288 (S.D.N.Y. 1967); United States v. McCarthy, supra; United States v. Eskow, supra, at p. 558 (S.D.N.Y. 1968). In United States v. Dioguardi, 332 F.Supp. 7, 20 (S.D.N.Y. 1971), Judge Lasker expressed the well established rule that the compelling need required for pre-trial disclosure of Grand Jury testimony must consist of something amounting to a "gross and prejudicial irregularity influencing the grand jury." See, United States v. Proctor & Gamble Co., 356 U.S. 677, 684 (1958), stating that good cause for production of Grand Jury transcripts exists "only when the criminal procedure has been subverted."

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Here relevance and usefulness are not enough; a defendant must meet the "heavy burden", Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963), of establishing that "without the transcript a defense would be greatly prejudiced or that without reference to it an injustice would be done." United States v. Proctor & Gamble, supra, at 682. This, the defendants have failed to do and no such allegation has been or could be made herein.

For the foregoing reasons, the Government respectfully requests the Court to deny the defendants' motions for discovery and inspection of Grand Jury minutes and exhibits except as consented to by the Government.

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(12) MOTION FOR SEVERANCE OF INDIVIDUAL DEFENDANTS

Defendants Marques, Morales, and Ferreiro each move for a severance and a separate trial. The Government opposes each motion.

In brief, the moving defendants contend that severance is necessitated on the following grounds: that the defendants will be unnecessarily prejudiced by the spillover of some of the evidence presented at trial; that the defendant Morales is only a 'peripheral' defendant and as such her separate trial, if granted, will be a very short trial; and that the defendants Marques and Ferreiro will, most likely, encounter conflict of interests problems at trial since they are being defended by the same attorney.

As a general matter, the interest of convenience, economy and efficient administration of justice dictates that persons joined in the same indictment should be tried together, particularly where the proof will be extensive and numerous witnesses must be summoned. United States v. Lebron, 222 F.2d 531, 535 (2d Cir.), cert. denied, 350 U.S. 876 (1955); United States v. Crisona, 271 F. Supp. 150 (S.D.N.Y. 1967); United States v. Kahaner, 203 F. Supp. 78 (S.D.N.Y. 1962). While the decision as to whether or not to grant a severance is left to the discretion of the trial court, Opper v. United States, 348

U.S. 84 (1954); United States v. Aviles, 274 F.2d 179, 194 (2d Cir. 1960), the burden is upon the defendants to show that they would be so prejudiced by a joint trial that it would rise to constitutional proportions. United States v. Haim, 218 F. Supp. 922 (S.D.N.Y. 1961).

Defendants Marques and Ferreiro have stated that there may be a conflict of interests during the course of trial if the same attorney, Joseph I. Stone, Esq., continues to represent both of them. However, such possible conflict of interest could be solved if need be by the obtaining of new counsel for one or the other of the defendants affected.

The defendants fail to furnish any facts demonstrating that they would be unable to secure a fair trial in a joint proceeding. The Government, on the other hand, represents that the evidence to be offered against each defendant will be subtantially the same as that to be offered against the other defendants, and that the conspiracy in this case is a continuing one in which each defendant became a member at various times. The proof of the conspiracy, therefore, will also be substantially the same as to each defendant. Moreover, time, expenses, and effort would be greatly diminished for all parties concerned at a joint proceeding.

For the foregoing reasons the Government respectfully requests that the Court deny the defendants' motion for severance.

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(13) THE MOTION TO INSPECT STATEMENTS, RECORDED OR OTHERWISE, OF CO-DEFENDANTS SHOULD BE DENIED

Defendant Morales moves to discover any and all statements, recorded or otherwise, which were made by co-defendants or other individuals, including co-conspirators. This request by the defendant not only disregards the provisions of Rule 16(a) but is an attempt to learn whether any co-defendant or co-conspirators will testify for the Government.

Subdivision (a) of Rule 16, F.R.Cr.P. limits pre-trial discovery to the defendant's own statements, own Grand Jury testimony and reports of the result of any mental or physical examination of his own person, as well as scientific tests or experiments generally, if performed in connection with the particular case to which the motions are addressed. The definition of 'statements' discoverable under Rule 16(a) was amplified to include those made by the defendant both before and after arrest. United States v. Crisona, 416 F.2d 107 (2d Cir. 1969), cert. denied sub nom De Lyra v. United States, 397 U.S. 961 (1970). No court, thus far has attempted to expand, for discovery purposes, the definition of "statement" to include declarations of co-conspirators which might, under rules of evidence, be

admitted against the defendant at trial. Recently, the Second Circuit rejected a similar request on the behalf of the defense. See, United States v. Percevault, __F.2d __, 2d Cir. 1974), in slip opinion dated January 8, 1974. See also, United States v. Feeney, et al., 73 Cr. 747 (Transcript of Pre-trial Hearing, November 20, 1973 at p. 5) (Gurfein, J.); United States v. Peter Ottley, et al., 73 Cr. 830 (Transcript of December 4, 1973 at pp. 5-7 (Frankel, J.); both cases rejecting a similar motion.

Title 18, U.S.C. §3500 too, is absolute in its prohibition of pre-trial discovery of statements or reports made by anyone "other than the defendant" prior to the termination of direct examination of that person.* The clear import of the section is that statements by others, even those which may be attributed to the defendant or for which he may be held criminally responsible are not discoverable at any time until the person making the statement has testified to it. To hold that such statements may be the subject of discovery, is to destroy the possibility of a fair trial for the government and to open the proverbial "door" to the perfectly tailored defense, since almost any witness against a defendant can be expected to testify that the defendant told him something or said

*§3500. Demands for production of statements and reports of witnesses.
(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

something in his presence.

Defendants also seek to discover the statements and Grand Jury testimony of co-conspirators. Basically, this request is no different from the request for such material of co-defendants. All co-conspirators are presently considered prospective government witnesses whose statements will be produced after they have testified pursuant to Section 3500, Title 18, U.S.C. A pre-trial disclosure of statements and testimony of co-conspirators who are potential Government witnesses would run directly counter to the mandates of 18 U.S.C. §3500. United States v. Cole, 453 F.2d 902, 905 (8th Cir.), cert. denied, 406 U.S. 922 (1972); United States v. Sendejas, 428 F.2d 1040, 1046 (9th Cir.), cer . denied, 400 U.S. 879 (1970); United States v. Calandruccio, 67 Cr. 553 (S.D.N.Y. Sept. 20, 1967). Such a request appears, moreover, to be merely an attempt to compel the Government to disclose its entire evidence in advance of trial. Cf. United States v. Lebron, 222 F.2d 531, 535-36 (2d Cir.), cert. denied, 350 U.S. 876 (1955); United States v. Dorfman, 53 F.R.D. 477 (S.D.N.Y. 1971).

For the foregoing reasons the Government respectfully requests that the defendant's motions be denied.

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(14) THE DEFENDANTS ARE NOT ENTITLED TO THE NAMES OF GOVERNMENT INFORMANTS

Defendants Gotes-Contreras and Morales move to seek disclosure of the names of any Government informants. In addition, the defendants seek to interview any Government informant as part of their defense preparation.

The rule applicable to the disclosure of an informant was stated in Roviaro v. United States, 353 U.S., 353 U.S. 53, 62 (1957):

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

The defendants have made no showing that the disclosure of an informant's identity would be "relevant and helpful to the defense of the accused" or that it is "essential to a fair determination of a cause". Roviaro, supra at 60-61. The burden is on the defendants to show the necessity of disclosure and this they have not done. Moreover, strong reasons dictate against requiring the Government to disclose the identity of

informers especially at this stage in the proceedings, United States v. Soles, 482 F.2d 105 (2d Cir. 1973) United States v. Russ, 362 F.2d 843 (2d Cir.), cert. denied, 385 U.S. 923 (1966); United States v. Coke, 339 F.2d 183 (2d Cir. 1963); United States v. Cobb, 271 F. Supp. 159, 165 (S.D.N.Y. 1967). If an informant does exist and if the Government did have him testify in the Grand Jury the pre-trial disclosure of Grand Jury testimony of potential witnesses cannot be permitted, United States v. Weber, 197 F.2d 237 (2d Cir.), cert. denied, 344 U.S. 834 (1952), and other cases cited in this memorandum.

With respect to the defendants' motion seeking to interview any informant, the Government consents to make arrangements, if further and specific requests are made, for the defendant to meet with any informant, if he or she exists and if he or she agrees to be interviewed by defense counsel.

For the foregoing reasons the Government respectfully requests that the defendants' motion be denied except as consented to by the Government.

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(15) THE MOTION TO SUPPRESS DEFENDANT'S STATEMENTS SHOULD AT THIS POINT BE DENIED

Defendant Morales moves for an order to suppress all statements made by her. Accordingly a suppression hearing should be held prior to trial.

(16) THE SEVERAL MOTIONS OF THE DEFENDANTS FOR A BILL OF PARTICULARS SHOULD BE GRANTED ONLY TO THE EXTENT CONSENTED TO BY THE GOVERNMENT

The Government consents to provide a bill of particulars setting forth the approximate date, time and place of the overt acts listed in the indictment and to provide the names of additional co-conspirators not named in the indictment. The Government does not consent to provide any further information in such bill of particulars and requests for such further information should be denied.

It is clear that the purpose of a bill of particulars is to minimize surprise, to enable a defendant to obtain such ultimate facts as are needed to prepare his defense, and permit a defendant successfully to plead double jeopardy if he should be prosecuted later for the same offense. United States v. Lebron, 222 F.2d 531 (2d Cir.), cert. denied, 350 U.S. 876 (1955); United States v. Malinsky, 19 F.R.D. 426, 428 (S.D.N.Y. 1956); United States v. Bentvena, 193 F. Supp. 485, 498 (S.D.N.Y. 1960), aff'd, 319 F.2d 916 (2d Cir.), cert. denied, 375 U.S. 940 (1963).

None of the items the furnishing of which the Government opposes falls within the required or advisable area of pretrial disclosure.

The eight page indictment in the case at bar adequately details the charges against the defendants. The overt acts paragraph in the conspiracy count alone spells out twenty-two separate acts depicting the manner in which the conspiracy was carried out. The conspiracy count also states in captioned paragraphs the following items: The Smugglers, The Receivers, the Buyers, as well as the Means of the Conspiracy. The defendants, therefore, are provided with an abundance of information from which they can adequately prepare a defense.

In the face of the substantial amount of information in the indictment and discovery already consented to by the Government, the several defendants have sought particulars calling for the Government to disclose its entire case. It is respectfully submitted that the great abundance of these requests are completely unnecessary, go far beyond the most liberal interpretations of Rule 7(f), and are designed to discover the identity of the Government witnesses and to obtain a preview of the Government's evidence and legal theory.

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Potentially beneficial as it may be to a defendant, a bill of particulars has been held not to be a device to compel disclosure of the Government's evidence or legal theory in advance of trial. E.g., United States v. McCarthy, 292 F. Supp. 937, 940-941 (S.D.N.Y. 1968); United States v. Lebron, 222 F.2d 531, 535-536 (2d Cir.), cert. denied, 350 U.S. 876 (1955); United States v. Fruehauf, 196 F. Supp. 198, 199 (S.D.N.Y. 1961). In United States v. Malinsky, 19 F.R.D. 426, 428 (S.D.N.Y. 1956), Judge Walsh said:

> "The purpose of a bill of particulars is to inform the defendant as to the crime for which he must stand trial, not to compel disclosure of how much the Government can prove and how much it cannot nor to foreclose the Government from using proof it may develop as the trial approaches. Discovery in criminal proceedings is not comparable to discovery in civil because of the nature of the issues, the danger of intimidation of witnesses, and the greater dnager of perjury and subornation of perjury. Defendants must find their compensation in the presumption of innocence and in the high burden of proof which the prosecution must meet."

The great majority of the particulars demanded fall within one or more of the following categories which are not properly part of a bill: (1) demands which call for disclosure of the Government's evidence

and theory of the case, e.g., United States v. Callahan, 300 F. Supp. 519, 526 (S.D.N.Y. 1969); United States v. Lebron, supra; United States v. Kushner, 135 F. 2d 668, 673 (2d Cir.), cert. denied, 320 U.S. 212 (1943); United States v. Verra, 203 F. Supp. 87, 92 (S.D.N.Y. 1962); United States v. Fruehauf, supra, (2) demands which call upon the Government to reveal its legal theory, e.g., United States v. Klein, 124 F. Supp. 476 (S.D.N.Y. 1954); United States v. Schillaci, 166 F. Supp. 303, 307 (S.D.N.Y. 1958); United States v. Doyle, 234 F.2d 788 (7th Cir.), cert. denied, 352 U.S. 893 (1956); United States v. Kelley, 245 F. Supp. 198 (S.D.N.Y. 1961), (3) demands calling for particularization of what is not part of the charge alleged in the indictment. E.g., United States v. Birrell, 61 Cr. 692, S.D.N.Y. January 19, 1967; United States v. MacLeod Bureau, 6 F.R.D. 590, 592 (D. Mass. 1947), (4) demands calling for the identity of Government witnesses. E.g., United States v. Bentvena, 193 F. Supp. 485, 498 (S.D.N.Y. 1960), aff'd, 319 F.2d 916 (2d Cir.), cert. denied, 375 U.S. 940 (1963); United States v. Stromberg, 22 F.R.D. 513, 522 (S.D.N.Y. 1957).

Almost all of the demands directed by the defendants at the conspiracy count amount to requests for detailed particulars of the means by which the Government intends to prove the conspiracy. It is clear

that such requests are inappropriate. United States v. Lieberman, 15 F.R.D. 278 (S.D.N.Y. 1953). The charge in the conspiracy count is simply that the conspirators agreed to act in the manner outlined in the indictment and that the overt acts alleged were done pursuant to that agreement. Requests for other acts pursuant to the conspiracy are not requests for particularization of the charge in the indictment but are simply requests for the evidence which the Government may have of the conspiracy's existence. Moreover, the Government may or may not decide to prove that the conspirators fully or partially implemented their agreement as proof of the agreement's existence. Since a bill of particulars will limit the Government's proof at trial, the decision as to what proof the Government will offer in this regard should not be forced now by a bill of particulars. United States v. Lang, 40 F. Supp. 414, 415 (E.D.N.Y. 1941); United States v. Gouled, 253 Fed. 239, 240 (S.D.N.Y. 1918), modified on other grounds, 255 U.S. 298 (1920).

Accordingly, the Government respectfully requests that the Court deny the motion for a Bill of Particulars except insofar as consented to by the Government.

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CONCLUSION

For the reasons stated, the Government respectfully requests that the several motions of the defendants be denied except insofar as consented to by the Government.

Dated: New York, New York

August 22, 1974

Respectfully submitted,

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Certificate of Service

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I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

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